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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

Estate of KENNETH C. WALTERS, Deceased.	B199241 (Los Angeles County Super. Ct. No. BP 090741)
LINDA KAY NEWMAN, Petitioner and Appellant, v. ALEXANDER NIELLA, Petitioner and Respondent.	

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Aviva K. Bobb, Judge. Affirmed.

Law Offices of Richard Pech and Richard Pech; Goodson, Wachtel & Petrulis and Kenneth G. Petrulis, for Petitioner and Appellant.

Oldman, Cooley, Sallus, Gold, Birnberg & Coleman, Marshal A. Oldman, Susan J. Cooley, Marc L. Sallus and Sarah Talei for Petitioner and Respondent.

SUMMARY

Kenneth Walters was a dependent adult who executed a will leaving his estate to his long-time friend and care custodian, Alexander Niella. Under Probate Code section 21350,[1] a donative transfer by a dependent adult to a care custodian is invalid, unless an exception provided in section 21351 applies. Section 21351 permits such a transfer if the dependent adult obtains a certificate of independent review from an independent attorney, who must "attempt[] to determine" if the intended transfer is the result of undue influence, and who issues the certificate if she concludes that it was not. Walters obtained a certificate of independent review from attorney Marie Cioth, who concluded Walters's will was not the result of undue influence.

After Walters died, his niece Linda Newman, who had not seen Walters in more than 25 years, contested the will. She claimed (among many other things) lack of testamentary capacity, undue influence by Niella with respect to the making of the will, and invalidity of the transfer to a care custodian under section 21350. After a long trial, the probate court rejected Newman's claims and received the will into probate, aptly observing that "[t]here is no evidence in this very large record that any one ever persuaded the decedent to do anything he did not want to do."

Newman contends this court should reverse the judgment, on the sole ground that Cioth (according to Newman) was not qualified to provide a certificate of independent review and failed to undertake a sufficient investigation before doing so. We conclude there is no merit to Newman's claims. Cioth's attempt to determine whether the will was the product of undue influence was reasonable under the circumstances, and therefore in compliance with statutory requirements. Moreover, a further investigation could not have uncovered more than was revealed after weeks of trial: a record "totally devoid" of

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[1] All further statutory references are to the Probate Code, unless otherwise specified.

any evidence demonstrating that undue influence was exerted. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Six months before he died in February 2005, Kenneth Walters executed a new will leaving his estate to Alexander Niella, his friend of 15 years, and Niella's family, upon whom Walters depended for care during the last two years of his life. In March 2005, Niella filed a petition for probate of the August 31, 2004 will. Walter's niece, Linda Newman, filed a contest to the will, and also filed a petition claiming elder abuse, seeking the return of two pieces of real property Walters had transferred to Niella before his death (in April and May 2004), and asserting other claims. Newman's claims of elder abuse, constructive fraud and conversion were bifurcated for a jury trial; issues within exclusive probate jurisdiction were to be tried first.

Trial of the will contest began on June 21, 2006, and continued for 23 days (or partial days). In the following recounting of the relevant evidence, we borrow liberally from the trial court's cogent summary of the facts adduced at trial.

Walters died in February 2005 at the age of 91. He was unmarried and had no children. At the time he executed the 2004 will, he had a sister, Hazel Adams, who had a son (Ronald Adams) and a daughter (Linda Newman), all of whom lived in Michigan. Walters also had another niece, Mary Ellen McElwaine, who lived in Florida and is the daughter of a deceased brother. Walters executed previous wills, in 1977 and 1987, devising his estate to these relatives.

Newman saw her uncle on eight occasions in her life, including several visits in California. McElwaine saw her uncle on four occasions, including one visit to California. The last time Walters saw any of his relatives was in 1979, and he had only sporadic contact from his nieces and nephew during the last 15 years of his life. However, Walters talked to his sister Hazel almost every Sunday until 2003, when she became increasingly mentally incapacitated.

Walters, who had a doctoral degree in mathematics, viewed himself as a very talented artist, writer and composer. (A sign in front of Walters's apartment stated, "The

Walters Museum of Living Artists.") In 1990, Walters hired Niella as a sound recording engineer for his music. Over the next decade, they recorded more than 12,000 songs composed by Walters. Walters owned several apartment buildings, and Niella also began to manage Walters's real property. Niella's family, including his father, wife and children, became close to Walters. In the last two years of Walters's life, Niella managed all of Walters's assets, and Niella and his family were Walters's caregivers. Niella's father lived, rent-free, in the apartment above Walters's apartment, prepared Walters's meals, and could be summoned by a buzzer at any time.

When Walters first hired Niella to record songs, Walters paid Niella $100 for each song recorded. Between 1993 and 2002, Walters paid Niella for services and also gave him gifts in excess of $400,000, including down payments for a home in Beverly Hills and another property. By 1998, Walters was giving Niella money for whatever Niella needed to cover his expenses. By 2004, all the money Walters possessed was considered money he had jointly with Niella, and records were not kept.

In January 2004, Walters was hospitalized and diagnosed with prostate cancer. By then (and for at least the preceding year), Walters was functionally blind and bedridden. During his hospitalization, he suffered a transitory delirium, and some of the medical records indicated he appeared "demented." As a result, an adult protective services worker, Deborah Riggin, went to his home. Riggin was new to her work, and was concerned about the possibility of financial abuse, since Walters was legally blind and dependent on the Niellas. Riggin referred the case to the Public Guardian's office for a possible conservatorship. In April 2004, Burbank police officers did a wellness check on Walters, and found him quick witted, sharp, and intelligent; the officer concluded there was no cause for concern about Walters's needs.[2] In December 2004, Joyce

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[2] The wellness check was done at the request of Walters's nephew, after he and Newman received no return calls in response to telephone messages they had left for Walters.

Arnold, a deputy public guardian, visited Walters and determined that a conservatorship was unnecessary. She observed that Walters talked lucidly about his family, the Niellas, and his testamentary wishes (and she later told the attorney who prepared Walter's will that Walters was "sharp as a tack").

Meanwhile, in April 2004 Walters decided to change his will. (One of Walters's tenants, Ricardo Baker, testified that, in 2001 or 2002, Walters told him that he wanted his estate to go to Niella, and that he "absolutely didn't want anything to go to his relatives.") Walters made a DVD in April 2004, in which he castigated his nephew for putting Walters's sister Hazel in a nursing home, instead of taking care of her in her home. In the DVD, he said that if Ronald (the nephew) had known what had happened to Walters physically, "[h]e would have put me in a rest home …. So anything I gave to Hazel [s]he would automatically give to Ronald." Walters continued:

> "And . . . Linda . . . probably couldn't prevent anything I gave them from going to Ronald. [¶ . . . ¶] . . . But I have no use for Ronald Adams and I have no desire to give him any more than that $28,000 [which Walters gave Ronald years ago to pay off his mortgage] . . . [¶ . . . ¶] [W]hen you consider how much I have given in cash, some of it in loans to Hazel and Linda and Ronald that the total amount of money they've received has been between $200,000 and $300,000. . . . [¶] [S]o I don't feel obligated to give them anything more when I die. [¶] But I have a new family, acquired family, and they are wonderful to me . . . . [¶] Alex and his father . . . watch over me 24 hours a day and [are] helped by Alex's daughter, Natalia, and his wife Monica. [¶] And it's wonderful the way they treat me. They really do love me . . . [¶] And they take care of me . . . . [¶] [I]t's the most wonderful thing that ever happened in my life. [¶] They are such wonderful people, very deeply loving people, and I couldn't be loved any more by anybody than these people. . . . [¶] [S]o they deserve and will receive in my last will and testament all of my . . . property . . . ."

In April 2004, Walters also deeded one his of five remaining properties to Niella and his wife. In May 2004, he deeded them a second piece of real property. (The notary public who provided the documentation for these transactions, Dorene Kessinger, testified that she satisfied herself that Walters was acting on his own volition and not

under coercion or duress before she notarized the property transfers.) In June, Walters saw an attorney, Shirley Bliss, and related facts similar to his statements in the DVD; Bliss gave him estate planning advice about leaving his assets to Niella, but Walters ultimately decided not to hire her. In August 2004, Walters saw attorney William Eick and gave him the same facts. (Apparently, Niella found Eick in the yellow pages.) Eick met with Walters; in the trial court's words, "[t]here [was] no evidence that Niella was present in the room during Eick's meeting with Walters or that he in any way urged a particular disposition of [Walters's] assets, or had anything to do with the contents of the will or its physical preparation." Eick prepared a new will, and wrote a detailed letter to Marie Cioth, describing all that he had gleaned from his meeting with Walters, and asking her to interview Walters. Eick's letter included his own conclusion that Walters had the mental capacity to make a will, "knows his relatives, and knows he does not want to give anything to them," and was not acting under fraud or undue influence.[3]

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[3] Eick's letter to Cioth provided details of his hour-long meeting with Walters. His letter included Walters's tale about a dentist who "snuck up behind [him], … grabbed his jaw and gave him a novocaine shot," as a result of which Walters weight dropped from 123 to 98 pounds, and the experience "brought his own mortality to the forefront of his mind." (The evidence at trial suggested that Walters had an obsession relating to Novocain for much of his life; this was described as a "somatic delusion, which is related to Mr. Walters' obsession and his belief that he has been subjected to novocaine to which he has a peculiar sensitivity.") Walters explained to Eick his present will and his desire to change it; his antipathy toward his nephew, whom he thought would get any money Walters left to his sister Hazel; and his desire to leave everything to Niella. Eick questioned Walters about his background, which Walters recounted, including an assertion that by age 14 he was accomplished enough as a painter that he could replicate any painting in the Louvre, and that he had written and copyrighted more than 12,000 songs, none of which took him more than 4 minutes to compose, and these were world records at some point in time. Walters said that he had paid Niella for the last 15 years, whether for sound recording services or otherwise, "and that if Mr. Niella needed money he could have it." Walters also told Eick that the notary who notarized his signature on the May 2004 deed "talked to him for about 45 minutes before she would notarize the document and to be sure that he was acting of his own free will."

Cioth, who had been a probate and estate planning attorney for ten years, reviewed Eick's letter detailing his interview with Walters, and reviewed a draft of the will. She then met with Walters alone for more than 40 minutes. She documented the interview with a three-page memorandum, describing Walters's person and assets, his relations with his family, and his relations with the Niella family. Her detailed notes of the interview described her counseling of Walters and her findings, and her memorandum reflected the same information Walters gave in his April 2004 DVD and gave to his other attorneys, the Public Guardian, and the notary who prepared the 2004 deeds.[4] Cioth subsequently signed and delivered a certificate of independent review to Walters, concluding the will was not the product of fraud, menace, duress or undue influence.

Among the trial court's observations were these, which our review of the record confirms:

- "The decedent appeared from the record to be a highly intelligent, strong-willed man, with some eccentricities and grandiose delusions about his artistic, musical and literary abilities."
- During the last two years of his life, while he was functionally blind, bedridden, and totally dependent on the Niella family, "he appeared to all who interviewed him at home to be totally alert, in command of his environment and financial affairs. All of the professionals who interviewed

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[4] Cioth told Walters she was meeting with him to determine if he knew the consequences of his actions in the disposition of his estate, and to determine if he was being coerced into taking those actions. In addition to relating information about his reasons for not wanting to leave anything to his family, his song-writing and his 15-year relationship with the Niellas, Cioth observed that Walters's apartment was clean; he was in bed with both a remote ringer and a "first response" device by his side; Walters "appeared to be completely cognizant of how much money was being generated by the rentals" of his apartment buildings, and "[h]e explained to me about the utilities and dividing up the expenses for the apartments that did not have separate meters"; Walters "appeared intelligent and lucid," and "tried to negotiate me down in my fees and then tried to negotiate billing only after his death."

[Walters] stated that Niella was not assertive in any respect. And there is no evidence that Niella brought pressure to bear on the making of the will or that he overcame or destroyed Walters' free agency."

- Walters did not want his family in Michigan to receive any of his assets; he felt the Niellas were his family and he wanted them to have his assets.

As to Newman's claim that Cioth's certificate of independent review should be ignored because Cioth did not have the requisite training and conducted an insufficient investigation, the trial court pointed out that:

- Cioth had been a probate and estate planning attorney for ten years.
- The statute does not specify the level of inquiry that must be made to determine that a transfer is not the product of undue influence.
- Cioth's investigation did not reveal a number of arguably significant facts about Walters. For example, Cioth did not learn the extent to which Walters had been giving his assets to Niella (although Cioth did know of the two 2004 transfers of real property to the Niellas), and did not know about the transitory delirium Walters had suffered during his hospitalization in January 2004.
- While Cioth did not uncover those "specific historical facts," her investigation reached the same conclusion, with respect to the independence of Walters's actual decision-making, as that of every other professional who talked to Walters, and her conclusions "could not have changed because even the voluminous court record contains no evidence of acts constituting undue influence."

Newman requested a statement of decision, and Niella filed a proposed statement of decision which, with a modification by the court, was entered together with a judgment in favor of Niella. This appeal followed.[5]

DISCUSSION

Newman does not challenge the trial court's conclusion that Walters had testamentary capacity. Nor does she challenge the trial court's conclusion that the record is "totally devoid" of evidence demonstrating any instance in which Niella exerted improper influence. Her sole argument is that Cioth was not qualified to provide a certificate of independent review, and failed to conduct a sufficient investigation, so that the trial court erred in refusing to invalidate the certificate of independent review. As will appear, we disagree with Newman's premises, and therefore affirm the trial court's judgment.

We reiterate the statutory scheme as it applies here: Under Probate Code section 21350, a donative transfer by a dependent adult to a care custodian such as Niella is invalid, except as provided in Probate Code section 21351.[6] Section 21351 permits a

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[5] On the same date she filed her reply brief on appeal, Newman filed a request for judicial notice of (1) an article that appeared in the California Trust and Estates Quarterly, (2) her opposition to a motion in limine relating to the certificate of independent review (apparently to show that Newman brought certain legislative history to the attention of the trial court), and (3) a copy of the *Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel* (State Bar of California Trusts and Estates Section, 2008 ed.). The motion is denied. The first item is not among matters that may be judicially noticed (Evid. Code, § 452), and it is unnecessary to take judicial notice of the other items; we have considered the legislative history of the statute, and the *Guide* is merely a secondary source both parties have cited.

[6] Section 21350 states, in part: "(a) Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following: … (6) A care custodian of a dependent adult who is the transferor." (§ 21350, subd. (a).) Section 21350 also invalidates transfers to the person who drafted the instrument, to any person in a fiduciary relationship with the transferor who transcribes the instrument, and others. (§ 21350, subds. (a)(1)-(5).)

donative transfer to a care custodian if the instrument is reviewed by an independent attorney, who counsels the transferor about the nature and consequences of the intended transfer, "attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence," and signs and delivers a certificate of independent review.[7] (§ 21351, subd. (b).) The certificate of independent review must state that the attorney has reviewed the instrument, counseled her client on the transfer and, on the basis of that counsel, concluded that the transfer was valid because it was not the product of fraud, menace, duress or undue influence. In the absence of a certificate of independent review, Walters's devise to Niella would have been invalid, unless the court

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[7] Section 21351 states, in part: "Section 21350 does not apply if any of the following conditions are met: [¶] (b) The instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate in substantially the following form, with a copy delivered to the drafter:

'CERTIFICATE OF INDEPENDENT REVIEW

I, (attorney's name) have reviewed (name of instrument) and counseled my client, (name of client) on the nature and consequences of the transfer, or transfers, of property to (name of potentially disqualified person) contained in the instrument. I am so disassociated from the interest of the transferee as to be in a position to advise my client independently, impartially, and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in the instrument that otherwise might be invalid under Section 21350 of the Probate Code are valid because the transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

(Name of Attorney) (Date)'

Any attorney whose written engagement signed by the client is expressly limited solely to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client." (§ 21351, subd. (b).)

determined, on clear and convincing evidence (but not based solely on testimony from Niella and his family) that the transfer was not the product of fraud, menace, duress or undue influence. (§ 21351, subd. (d).) The purpose of the statutory scheme is to prevent unscrupulous persons in fiduciary relationships from obtaining gifts from elderly persons through undue influence or other overbearing behavior.[8] (*Bernard v. Foley* (2006) 39 Cal.4th 794, 809.) The Supreme Court has described the provision for a certificate of independent review as providing "a clear pathway to avoiding section 21350." (*Id.* at pp. 814, 815 ["in providing for a certificate of independent review (§ 21351, subd. (b)), the Legislature has provided transferors who so desire with a ready mechanism for making donative transfers to care custodians"].)

In this case, Newman contends we should invalidate the certificate of independent review because (a) Cioth admitted she did not know the elements of undue influence (and therefore did not know what she was looking for), and (b) Cioth should have done a host of things she did not do in order to satisfy the statute's requirement that she "attempt[] to determine" if the will was the result of undue influence. We reject Newman's contentions.

First, Newman's claim that Cioth admitted she did not know the elements of undue influence when she interviewed Walters is, in our view, not a fair construction of the record. In the first place, the concept of undue influence is not one that may be reduced to simple "elements."[9] *Estate of Ferris* tells us (in the context of proving undue influence in a will contest):

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[8] The statute was initially directed at attorneys drafting wills leaving themselves gifts of substantial value; in 1997, the statute was amended to include care custodians of dependent adults as presumptively disqualified donees. (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 319 & fn. 13.)

[9] Newman says the "elements of undue influence are contained in statutes like Civil Code section 1575," as well as scores of cases and numerous treatises. Civil Code section 1575 defines undue influence as consisting of: "1. In the use, by one in whom a

> "'[T]he rules governing the determination of whether a testamentary instrument is the product of undue influence are … as follows: "… it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. [Citation.] Evidence must be produced that pressure was brought to bear directly upon the testamentary act. [Citation.] Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will and must amount to *coercion* destroying free agency on the part of the testator. [Citation.] … mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. [Citation.]"'" [¶] . . . [¶]] 'Undue influence,' obviously, is not something that can be seen, heard, smelt or felt; its presence can only be established by proof of circumstances from which it may be deduced." (*Estate of Ferris* (1960) 185 Cal.App.2d 731, 733-734.)

At trial, Newman's counsel tried to get Cioth to admit she did not know "the elements of undue influence" when she met with Walters. Cioth replied, "I believe I looked it up in the Code, but that would be my practice, to look it up in the Code since this is part of the certificate." Counsel then asked Cioth: "Well, when you met with Mr. Walters on August 25 of 2004, what was your understanding as to the elements of undue influence?" Cioth answered, "Unfortunately, I do not remember; but I have what my basic understanding is. I do not remember." Again, Newman's counsel asked, "At the time that you met with Mr. Walters, had you looked up the elements of undue influence in California?" Cioth answered: "As I just stated, my custom and practice would be to look up the items that apply to it, and I don't recall exactly what I did two years ago."[10]

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confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; [¶] 2. In taking an unfair advantage of another's weakness of mind; or, [¶] 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress."

[10] Ironically, Newman's own expert, Marc Hankin, had a similar episode of failing to remember. Hankin criticized Cioth's statement that her job was to determine if Walters was being coerced, saying that "there are several [other things] in the 21351 mandate

None of the testimony Newman relies on supports the notion that Cioth did not comprehend the concept of undue influence when she issued her certificate of independent review. We will not assume that, because Cioth did not remember, two years later, what her understanding of "the elements of undue influence" was on August 25, 2004, she had no understanding of undue influence. Indeed, in describing her understanding of a certificate of independent review, she specifically stated that it included "find[ing] out . . . that he's doing this on his own volition . . . ." And she specifically told Walters that she was visiting him to determine if he knew the consequences of his actions "and to determine if he was being coerced into taking such actions." Lack of volition and coercion, as *Estate of Ferris* makes clear, are central to an assessment of undue influence. (*Estate of Ferris, supra*, 185 Cal.App.2d at pp. 733-734 ["[m]ere general influence . . . is not enough; it . . . must amount to *coercion* destroying free agency on the part of the testator"].)

Second, Newman contends that a proper "attempt[] to determine" if the will was the result of undue influence would have required Newman to do many things she did not do. According to Newman, Cioth should have, but failed to (1) confirm or verify anything that Walters told her; (2) review the prior will and other documents such as financial records; (3) interview Niella; (4) seek permission to review Walters's medical records and to contact doctors, friends, hospitals or relatives; and (5) determine the circumstances as to the two donative transfers of property to Niella in April and May 2004. Newman relies on the "undisputed" testimony of lawyer Marc Hankin, who opined that Cioth's conduct did not conform to the minimum requirements of the standard of care for an attorney doing a certificate of independent review. Hankins opined, among many other things, that Cioth was not competent because she did not have "quasi psychiatric experience," and a reasonably prudent attorney would have required Walters to sign a medical consent disclosure form, so that she could talk to his doctors

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. . . and coerced is only one of them." But when asked to identify the other ones, Hankin replied "I have forgotten. I will take a look at the statute."

and review his medical records (and Cioth should not have issued a certificate if Walters refused).[11]

The short answer is that the statute does not specify minimum attorney qualifications or minimum requirements for the investigation an attorney must conduct in order to issue a certificate of independent review. The court, in construing the statute, cannot add to or alter the clear language of the statute. (See *California Teachers Assn. v. Governing Bd. of Rialto Unified School District* (1997) 14 Cal.4th 627, 632-633 [courts must follow Legislature's intent as exhibited by the plain meaning of the actual words of the law; courts have no power to rewrite the statute to conform it to a presumed intention that is not expressed]; *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 475 ["[i]n construing the statutory provisions a court is not authorized to insert qualifying

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[11] Hankins opined, for example, that:

- Cioth was not competent to perform a certificate of independent review because she "didn't have the kind of quasi psychiatric training … or quasi psychiatric experience you get through practicing as a conservatorship lawyer over a number of years …," and "she hadn't dealt with elder abuse litigation . . . ."
- A reasonably prudent attorney would have required Walters to sign a medical consent disclosure form as a condition for doing the certificate of independent review; not obtaining such medical reports or contacting the doctors is inconsistent with a reasonable attempt to determine whether undue influence has occurred.
- A lawyer who sees evidence of "potentially very significant mental function deficits" such as shown in Eick's letter should seek an outside psychiatric referral to assess testamentary capacity.
- If Hankin had seen Walters's medical records and talked to his doctors, he "would have required both a neuropsych eval and a psychiatric evaluation" before proceeding with the certificate of independent review.

The trial court was, of course, free to reject Hankins's "undisputed" testimony, as he was merely giving his opinion on the meaning of the statute and on whether Cioth complied with it – a matter clearly within the province of the trial court.

provisions not included"].) The Legislature could easily have specified minimum requirements had it wished to do so. It did not, and accordingly we cannot rewrite the statute to require that every attempt to determine undue influence must include specific actions by the certifying attorney.[12]

Of course, courts may and do interpret statutes to include a reasonableness requirement where not doing so would produce an absurd result. (See *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1305 (*Upland*).)[13] Accordingly, a court may infer that section 21351 requires an attorney issuing a certificate of independent review to make an attempt to determine the existence of undue influence that is reasonable under the circumstances. But, even if we assume that, under some circumstances, an attorney might be required to seek medical records, or take other

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[12] Newman points out that section 21351 was amended in 2002 to add (among other clarifying changes) the "attempts to determine" requirement. A Senate Judiciary Committee report explains that "[a]pparently, some interpret the lack of clarity in the [then-existing] statute to mean that an attorney could make [the] certification of his conclusion [that the transfer was valid because it was not the product of fraud or undue influence] without actually attempting to determine whether or not fraud, duress, menace or undue influence was involved in the drafting or execution of the transfer instrument. Therefore, this bill would list this task in addition to advising the transferor of the nature and consequences of the transfer." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1575 (2001-2002 Reg. Sess.) as amended Apr. 1, 2002, p. 5.) We certainly acknowledge that the statute was so amended, but we fail to see how the clarification of the statute in this way assists Newman's claims.

[13] *Upland* involved a statute giving a peace officer the right to a representative of his or her choice during interrogations by the police department. The court observed that "[i]nfusion of a reasonableness requirement" in the statute "avoids the absurd result postulated [whereby an officer could prevent interrogation by choosing an unavailable person]"; the court said: "A reasonableness interpretation therefore carries out the legislative intent to protect the officer during interrogations without eliminating the ability of the Department to carry out prompt and timely interrogations of its own officers." (*Upland, supra,*111 Cal.App.4th at pp. 1305-1306.)

investigative actions, in order to make a reasonable "attempt[] to determine" the existence or absence of undue influence, this is not such a case.

Here, Cioth was presented with a testator who appeared (as Walters did to all who interviewed him) highly intelligent, strong-willed and totally alert – qualities that may be gleaned from the testator himself and without resort to further investigation.[14] The court expressly found Cioth's notes "to be credible, quite detailed, and that they reflect the same information the decedent stated in his DVD and had given to his other attorneys, the Deputy Public Guardian and the notary of the 2004 deeds." Under these circumstances, Cioth's investigation was reasonable, and we therefore cannot quarrel with the trial court's conclusion that there was "neither evidence presented . . . nor any legal basis shown, justifying disregard" of Cioth's certificate of independent review. Indeed, invalidating Cioth's certificate on the ground of insufficient investigation would be particularly inappropriate on a record showing that further investigation could not have revealed anything but what the lengthy trial revealed: no evidence of undue influence.[15]

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[14] We note that, in *Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel* (State Bar of California Trusts and Estates Section, 2008 ed.) § 4.3.9, the authors, who seek to provide "much needed guidelines to the certifying lawyer who issues a Certificate of Independent Review . . . to reduce the inher[ent] risks associated with such an engagement" (*id.*, p. 85), state that "***a review of the general matter with the client as outlined below serves as a proper foundation*** to determine the presence, or lack thereof, of fraud, menace, duress or undue influence." (*Id.* at p. 86, emphasis added.) The five principal points outlined are whether the testator understands the nature of the testamentary act; whether he fully comprehends the nature and extent of his property; whether he fully recollects the members of his family; whether he appears coherent, alert and oriented as to time and place and appreciates the purpose of the consultation; and a determination of the relationship that the testator enjoys with the disqualified person. (*Id.* at pp. 86-87.)

[15] Newman complains that we cannot rely on the fact that a 23-day trial resulted in no evidence of undue influence, because this would "eviscerate" the statute. The argument appears to be that, if the certificate of independent review were invalidated, Niella would have had to prove by clear and convincing evidence that the transfer was

In sum, we see no basis for concluding the certificate of independent review was inadequate or for overriding the wishes of a testator who, the evidence showed, was never persuaded by anyone to do anything he did not want to do.[16]

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not the product of undue influence (§ 21351, sub. (d)), a burden of proof not applied in this case. While the statement is correct, we fail to discern its relevance. The question in this case was whether Cioth's certificate satisfied the statutory requirements; no reliance was placed on any other exception to section 21350's presumptive disqualification of care custodians. Under Newman's view, even though Cioth, had she done everything Newman says she should have done, would have found no undue influence, we should nevertheless find the certificate of independent review inadequate. This we will not do.

[16] Newman also argues that Niella had the burden to prove, by a preponderance of the evidence, that the statutory requirements for the certificate of independent review were met, and that the trial court erred because it "refused to shift the burden of proof to [Niella] despite [Newman's] requests." We find this argument mystifying; it is apparently based on the fact that the trial court required Newman to file her trial brief first – a point which has nothing to do with the burden of proof on any particular issue. In any event, the trial court nowhere stated that Newman had, and did not meet, a burden to prove the statutory requirements were not met; the trial court expressly stated that the substantial weight of the evidence established that the section 21351, subdivision (b) exception was applicable and overcame the presumption of undue influence imposed by section 21350.

DISPOSITION

The judgment is affirmed. Alexander Niella is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

O'NEILL, J.[*]

We concur:

FLIER, Acting P. J.

BIGELOW, J.

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[*] Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.